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IN THE

Supreme Court of the United States

October Term, 1964

No. 718

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

v.

HARRISON MANN, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

STATEMENT OF JURISDICTION

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v.

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On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

STATEMENT OF JURISDICTION

I.

OPINION OF THE COURT BELOW

This appeal is taken from the Order on Mandate entered September 18, 1964, by the three-judge district court in the case of *Harrison Mann, et al.*, v. *Levin Nock Davis, et al.*, Civil Action No. 2604, United States District Court for the Eastern District, at Alexandria. The opinion upon Order on Mandate is unreported but is found as Appendix I to this statement.

II.

THE JURISDICTION OF THE COURT

1. The case below was originally brought by the appellees seeking a judgment declaring that the Virginia Apportion-

ment Acts of 1962 are unconstitutional and void. This appeal is taken from the Order on Mandate entered by the three-judge court on September 18, 1964, copy of which is attached as Appendix II to this statement. The statute pursuant to which this appeal is brought is 28 U.S.C. § 1253.

2. As stated above, the date and time of entry of the order sought to be reviewed by this appeal is September 18, 1964. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, at Alexandria, on October 2, 1964.

3. Section 1253 of Title 28, U.S.C. confers on this Court jurisdiction of this appeal and reads as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, 62 Stat. 926).

4. The following cases sustain the jurisdiction of this Court:

(a) *Continental Insurance Co.* v. *United States,* 259 U.S. 156 (1922);

(b) *St. John* v. *Wisconsin Employment Relations Board,* 340 U.S. 411, 414 (1951);

(c) *Palmetto Fire Insurance Co.* v. *Conn,* 272 U.S. 295, 305 (1920); and

(d) *Harrison* v. *NAACP,* 360 U.S. 167 (1959).

III.

THE QUESTION PRESENTED

Did the three-judge court below err in requiring that the terms of the present members of the Senate of Virginia be reduced from four years to two years, contrary to the provisions of the Constitution of Virginia?

IV.

STATEMENT OF THE CASE

The appellants are the Secretary of the State Board of Elections and the members thereof. The appellees are registered and qualified voters of the Commonwealth of Virginia residing, respectively, in Arlington County, Fairfax County and the City of Norfolk.

The three-judge court, in its Order on Mandate, among other things, declared and adjudged Chapters 635 and 638, Acts of Assembly of Virginia, 1962, which divide the Commonwealth of Virginia into senatorial and house districts for purposes of representation in the state legislature, to be void as denying the appellees and those similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States.

The Order on Mandate was stayed until December 15, 1964, to afford time for the General Assembly of Virginia to enact constitutionally valid reapportionment statutes for both houses of the General Assembly[1] and to enact statutes "to effectuate said reapportionment by providing for the election of members of both houses of the General Assembly from the districts of the State as reapportioned."

It was also declared and adjudged, for reasons stated in the opinion of the court below that while the terms of the present members of the House of Delegates should not be

[1]The Governor of Virginia has called the General Assembly into Special Session to convene on November 30, 1964 for this purpose.

terminated until "the expiration of the terms for which they were elected in November, 1963, or in any special election thereafter, that is on the day before the second Wednesday of January, 1968," the terms of the present members of the Senate, who were elected in November, 1963, for terms of four years, should also terminate upon the expiration of the terms of the members of the House of Delegates, who are elected for terms of only two years.

V.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 41 of the Constitution of Virginia provides as follows:

> "The Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November."

Section 24-13 of the Code of Virginia provides as follows:

> "Members of the Senate to represent each senatorial district of the State shall be elected on the Tuesday after the first Monday in November, nineteen hundred and fifty-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

VI.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal is directed to that part of the Order on Mandate which limits the terms of the present members of the Senate, who were elected for a term of four years in November, 1963, to the day before the second Wednesday in

January, 1966, a period of only two years, and to that part of the Order on Mandate which provides that the General Assembly of Virginia must, in effect, reduce the terms of members of the Senate by enactment of appropriate statutes not later than December 15, 1964.

Under the Order on Mandate, no further elections may be held until the General Assembly of Virginia has enacted "constitutionally valid reapportionment statutes" for both of its houses. The opinions of this Court in the redistricting cases require no more.

Yet, the court below is requiring that the terms of the present members of the Senate of Virginia be reduced from four years to two years.

As the record will show, these appellants made an application to the Chief Justice for a stay of the previous judgment of the court below entered on November 28, 1962. Such application was filed on December 11, 1962, and the answer of certain of the appellees herein, in opposition to the stay, was filed on December 12, 1962. In that answer, the appellees said:

> "Under Virginia's present election laws candidates for party nominations to the House of Delegates and Senate of the Commonwealth in the next primary election must file their declarations of candidacy on or before April 10, 1963, i.e., ninety days prior to July 9, which is the date of the primary election itself. Prospective State Senators nominated in such primary, if elected the following November, will take office in January, 1964, and serve until January, 1968. Members of the House of Delegates so nominated and elected would be in office until January, 1966. The entire General Assembly of the state is to be elected next fall. * * * "

Yet, the Chief Justice granted the appellants application for a stay on December 15, 1962.

Likewise, on or about February 12, 1963, all of the present

appellees filed with the Court motions to vacate the stay previously granted. Again, argument was made that the stay should be vacated since the election to be held in 1963 would determine representation in the Senate of Virginia until January, 1968.

Motions to vacate the stay of December 15, 1962, were not granted by this Court.

In *Davis* v. *Mann*, No. 69, October Term, 1963, decided June 15, 1964, 377 U.S. 678, 684, this Court noted:

> "With respect to relief, the Court stated that, while it would have preferred that the General Assembly itself correct the unconstitutionality of the 1962 apportionment legislation, it would not defer deciding the case until after the next regular session of the Virginia Legislature in January, 1964, because senators elected in November 1963 would hold office until 1968 and delegates elected in 1963 would serve until 1966. Deferring action would thus result in unreasonable delay in correcting the injustices in the apportionment of the Senate and the House of Delegates concluded the Court.
>
> * * *
>
> "An appeal to this Court was timely noted by defendants. On application by appellants, The Chief Justice, on December 15, 1962, granted a stay of the District Court's injunction pending final disposition of the case by this Court. Because of this stay, the November 1963 election of members of the Virginia Legislature was conducted under the existing statutory provisions. * * *"

With all of the above facts before this Court, the court below, in *Davis* v. *Mann, supra,* was directed as follows:

> " * * * After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable prin-

ciples *to insure that no further elections are held under an unconstitutional scheme.* * * * " (Emphasis supplied.) (377 U.S. 693).

Also, in the companion case of *Maryland Committee* v. *Tawes,* No. 29, October Term, 1963, 377 U.S. 656, 675, this Court noted:

> "In view of the circumstances of this case, we feel it inappropriate to discuss remedial questions at the present time. Since all members of both houses of the Maryland General Assembly were elected in 1962, and since all Maryland legislators are elected to serve four-year terms, the next election of legislators in Maryland will not be conducted until 1966. Thus, sufficient time exists for the Maryland legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections. * * * "

It is clear that this Court has permitted the members of both houses of the Maryland legislature to remain in office until 1967. It is equally clear that it was the intention of this Court to insure only that no further elections are held in Virginia under an unconstitutional scheme. This means that the members of the House of Delegates are to be elected under constitutional apportionment legislation in 1965 and that members of the Senate are to be elected under the same constitutional apportionment legislation in 1967.

The Maryland and the Virginia situations are similar and should be so treated by the courts. In Maryland, both houses of the legislature are left undisturbed until 1967. In Virginia, the House of Delegates should be reapportioned in 1964 and elected in 1965 to take office in 1966, a year earlier than the Maryland legislature, while the Senate should be reapportioned in 1964 and elected in 1967 pursuant to such valid reapportionment to take office in 1968, a year later than the Maryland legislature. The Maryland legislature

meets every year in regular session while the General Assembly of Virginia meets in regular session once in two years. This regular session is held on the second Wednesday in January next succeeding the election of the members of the House of Delegates. See, § 46 of the Constitution of Virginia.[2] The next regular session will be held in 1966. See, § 24-11 of the Code of Virginia.[3]

The legislature of Maryland is permitted to hold regular sessions in 1965 and in 1966, this being the same legislature that has now been declared to have been elected pursuant to unconstitutional apportionment statutes.[4] Yet, the three-judge court below refuses to permit the present members of the Senate of Virginia to meet in one regular session in 1966 to which they were duly elected.

It is submitted that this Court did not intend for two sister states to be treated in such different fashion, and that the three-judge court below has misconstrued the directions of this Court.

It must be remembered that the members of the Senate of Virginia are *de jure* officers since, at the time of the Senate elections in 1963, the order of the three-judge court, declaring the apportionment statutes unconstitutional, had been stayed by the Chief Justice. Yet, to repeat, the court below is requiring that the term of a senator be reduced from four to two years. This has been done even though the validity of § 41 of the Constitution of Virginia, providing for a four-year term of office, was not challenged by the appellees and, indeed, was recognized by them as controlling and valid. This Court did not intend that the three-judge court below

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[2]The provisions of § 46 of the Constitution of Virginia are found as Appendix III of this Statement.

[3]The provisions of § 24-11 of the Code of Virginia are found as Appendix IV of this Statement.

[4]See Order on Mandate in *Maryland Committee* v. *Tawes,* a copy of which is found as Appendix V of this Statement.

should disregard state constitutional provisions. Indeed, in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court said that courts should attempt to shape relief within the framework of state constitutional provisions. The three-judge court has erred in its failure to do this.

The appellants are aware of no other federal district court in the land which has ordered a state legislature to reduce the terms of its already elected members contrary to state constitutional provisions and statutes enacted pursuant thereto. This raises a serious and unprecedented question of law which should be passed upon by this Court.

VII.

CONCLUSION

Appellants submit that the substantial federal question presented by this appeal should be accorded plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, HENRY T. WICKHAM, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1964, I served copies of the foregoing Statement of Jurisdiction on the several appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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APPENDIX I

Opinion Upon Order On Mandate

Albert V. Bryan, Circuit Judge:

A foremost concern in framing the order on the mandate of the Supreme Court affirming our original decree is the question of the maximum period in which the present, 1963, General Assembly elected under the condemned statute may still function and with what powers. In our opinion it must expire as to both houses not later than the 2nd Wednesday in January 1966.

We think the 1963 Assembly necessarily is empowered to enact the requisite reapportionment laws. There is no other body to do so, and unless its jurisdiction is recognized for this purpose the State would be helpless to accomplish the reapportionment. The Supreme Court has tacitly approved this accordance of provisional vitality to the existing legislature. Maryland Committee v. Tawes, 377 U.S. 656, 675 (1964); Reynolds v. Sims, 377 U.S. 533, 585 (1964) adopting the view expressed by Justice Douglas concurring in Baker v. Carr, 369, U.S. 186, 250 footnote 5.

We think, also, that after the 1963 Assembly has enacted a constitutionally valid reapportionment statute—but not before then—and during the interval between its adoption and the commencement of the terms of the Senators and Delegates chosen in the 1965 elections, *vide post*, the Assembly should not be restrained from considering and passing such legislation as it considers necessary or proper in the public interest. If the present legislature could not act in this interim, a potentially dangerous interregnum could result, for there would be no legislature available in an emergency. Moreover, if this authority were not conceded, special elections for the creation of a new General Assembly would have to be called immediately after the passage of the reapportionment statute. This would mean an election of Delegates

to serve for a matter of months, when a primary election of Delegates is probable in July and a regular general election is set for November, 1965. That would be an undue burden upon the State elective processes. In these exigencies general principles of equity, as noted by the Supreme Court in the decisions just cited, sustain an order permitting such a temporary continuance of the powers of the current legislature.

In the effort to minimize disruption of the State's elective processes as far as possible, but still consistently with our first order, it is well to recall those processes and consider their application here. When our finding of invalidity in the legislative apportionment was made in November 1962, both houses of the General Assembly were to stand for election the following year, 1963. During the temporary stay of enforcement of this finding, the 1963 election proceeded upon the unconstitutional apportionment. Delegates were then chosen for 2-year terms expiring on the 2nd Wednesday in January 1966, and the Senators were selected for 4 years each, that is until the 2nd Wednesday in January 1968.

Orderly procedure would, therefore, suggest that the 1963 House of Delegates should continue in being until the expiration of their terms in January 1966. *Cf.* Reynolds v. Sims, *supra*, 377 U. S. 533, 585 (June 15, 1964). In the November 1965 general election a House of Delegates will, under the Virginia law, be elected to assume their duties on the 2nd Wednesday in January 1966. Of course, the 1965 House would be serving under the new apportionment.

As noted, however, the 1963 Senate would not normally leave office until January 1968. Elected on a void pattern of representation, there is no warrantable foundation for its accreditation beyond January 1966. Further, if it should be allowed to survive until 1968, the General Assembly—from January 1966 to January 1968—would be composed of a

House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (invalidated) plan. This too, would be constitutionally unjustifiable. Together the two houses in a bicameral system form a unitary and entire legislature. For equality of popular representation they are mutually complementary, and constitutional validity is not fulfilled if one house is deliberately permitted to lag behind the other in seeking fairness of representation. *Cf.* Maryland Committee v. Tawes, *supra*, 377 U.S. 656, 673

Incidentally, practical difficulties might develop if the life of the 1963 Senate lasted until 1968. In the event of vacancies in the Senate, as an illustration, they could not be filled because no elections may be conducted under the nullified apportionment statutes. Reynolds v. Sims, *supra*, 377 U. S. 533, 585. Probably none could be held under the new act because of the subsequent rearrangement of the district. While such eventualities might occur in the House of Delegates also, the opportunity there for such contingencies is for one year only—1965.

For these reasons we hold that the terms of the 1963 elected Senators as well as Delegates must come to an end not later than January 1966. Unavoidably, this will mean a special election of Senators to serve from January 1966 to January 1968. However, to repeat, we have stated only the maximum limits of the life of the present legislature. We do not mean to say that special elections may not be called earlier than November 1965, if the legislature desires, so that a General Assembly under the new reapportionment statute might be constituted before January 1966.

United States Circuit Judge

September 18, 1964.

APPENDIX II

Order On Mandate

This action came on to be heard upon the mandate of the Supreme Court of the United States affirming the judgment order of this Court entered November 28, 1962, upon the motions of the plaintiffs and intervening plaintiffs for an order on said mandate and the argument of counsel; upon a consideration of all of which it is

DECLARED, ADJUDGED AND ORDERED:

1. That the Governor of Virginia and the Attorney General be dismissed as parties defendant to this action;

2. That the motion of the defendants to dismiss the complaint and intervening petition be denied;

3. That the acts of the General Assembly of Virginia, approved April 7, 1962, appearing as Chapter 635, page 1266, and Chapter 638, page 1269 of the 1962 Acts of the Assembly of Virginia, deny the plaintiffs and plaintiff-interveners and those persons similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, and that the said acts for that reason are void and of no effect;

4. That the order entered by this court on November 28, 1962 be in all respects reaffirmed but the enforcement of said order be further stayed until December 15, 1964 insofar as necessary to afford ample time for the General Assembly of Virginia to be called and convened in special session, if the Governor or the requisite number of members of the General Assembly are so advised, for the purpose of enacting constitutionally valid reapportionment statutes for both houses of the General Assembly, and enact statutes to effectuate said

reapportionment by providing for the election of members of both houses of the General Assembly from the districts of the State as reapportioned;

5. That, for the reasons set forth in the opinion filed this day, the terms of the present members of the House of Delegates shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms for which they were elected in November, 1963 or in any special election thereafter, that is on the day before the second Wednesday of January, 1966;

6. That, for the reasons set forth in said opinion, the terms of the present members of the Senate, who were elected in November 1963 or in any special election thereafter, shall not be terminated by force of the said order before, but shall terminate upon, the expiration of the terms of the members of the House of Delegates elected in November, 1963 or thereafter as aforesaid, that is the day before the second Wednesday in January, 1966;

7. That the motion of the plaintiffs and plaintiff-interveners that the present General Assembly be enjoined at this time from enacting any legislation other than the said reapportionment statutes be denied; but by way of a declaratory judgment the court now states that after the enactment of a constitutionally valid reapportionment statute the present General Assembly may until the 2nd Wednesday in January 1966 consider and pass such legislation as it deems necessary or proper in the public interest, unless before that date through special elections a General Assembly is chosen in conformity with the new reapportionment statute.

8. That the motion of the defendants for a continuance is also denied, in view of the stay herein granted of the ef-

fectiveness of the order issued by this Court on November 28, 1962;

9. That the plaintiffs and plaintiff-interveners recover of the defendants their statutory costs, assessed or assessable in the Supreme Court and in this court, and that the motion of the plaintiff-interveners for an allowance of counsel fees as a part of said costs is denied; and

10. That if the steps stated in paragraph 4 hereof for reapportionment be not taken before December 15, 1964, or if taken they do not meet the requirements of a constitutionally valid reapportionment, then the plaintiffs, the plaintiff-interveners and any part hereafter granted leave to intervene, may apply to the court for such further orders as may be required; and jurisdiction of this action is hereby retained for entry of such other orders as may be necessary or proper.

.....

United States Circuit Judge

.....

United States District Judge

.....

United States District Judge

September 18, 1964.

APPENDIX III

§ 46, Constitution of Virginia

§ 46. *Time and duration of meetings of General Assembly; adjournments; majority shall be a quorum; power of smaller number than a quorum.*—The General Assembly shall meet once in two years on the second Wednesday in January next

succeeding the election of the members of the House of Delegates and not oftener unless convened in the manner prescribed by this Constitution. No session of the General Assembly shall continue longer than sixty days; but with the concurrence of three-fifths of the members elected to each house, the session may be extended for a period not exceeding thirty days. Members shall be allowed a salary for not exceeding sixty days at any regular session, and for not exceeding thirty days at any extra session. Neither house shall, without the consent of the other, adjourn to another place nor for more than three days. A majority of the members elected to each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and shall have power to compel the attendance of members in such manner and under such penalty as each house may prescribe.

APPENDIX IV

§ 24-11, Code of Virginia, 1950

§ 24-11. *When members of the House of Delegates elected; term of office.*—The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred and forty-nine, and biennially thereafter on the Tuesday succeeding the first Monday in November for a term of two years to begin on the second Wednesday in January succeeding their election.

APPENDIX V

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.
Plaintiffs-Appellants,

v.

J. MILLARD TAWES, Governor, ET AL.,
Defendants-Appellees

In the Court of Appeals of Maryland
No. 140, September Term, 1962

ORDER

This cause coming on for hearing upon the motion of the appellants for a clarifying order on remand from the Supreme Court of the United States, and it appearing to the court that no clarification is necessary or advisable at this stage of the proceedings, it is thereupon this 23rd day of September, 1964, by the Court of Appeals of Maryland,

ORDERED: that the case be and it is hereby remanded to the Circuit Court for Anne Arundel County with directions to retain jurisdiction and to take affirmative action upon the application of any of the parties to this cause, if the Maryland Legislature should fail to enact a constitutionally valid State legislative apportionment scheme prior to the 1966 primary elections in compliance with the decision of the Supreme Court in the case at bar. Costs to be paid by the appellees.

William L. Henderson
Chief Judge